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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL HOCKEY LEAGUE, Plaintiff, v. NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION, Defendant.	:	16-CV-4287 (AJN)

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO CONFIRM

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Plaintiff National Hockey League (the "NHL" or "League"), submits this memorandum in support of its motion for summary judgment vacating the arbitration award issued by the "Neutral Discipline Arbitrator" ("NDA") in an arbitration proceeding conducted pursuant to the collective bargaining agreement ("CBA") between the NHL and the National Hockey League Players' Association ("NHLPA"). The NHL also submits this memorandum in opposition to the NHLPA's motion to dismiss or, in the alternative, to confirm the award.

I. SUMMARY

On January 27, 2016, during the second period of a game between the Calgary Flames and the Nashville Predators, Calgary defenseman Dennis Wideman collided with NHL linesman Don Henderson. The blow sent Mr. Henderson crashing face forward onto the ice.

On February 3, 2016, NHL Senior Executive Vice President of Hockey Operations, Colin Campbell, suspended Mr. Wideman for twenty (20) games for on-ice conduct in violation of the League Playing Rules. Pursuant to the CBA, Mr. Wideman appealed the suspension to NHL Commissioner Gary Bettman. On February 17, 2016, Commissioner Bettman issued a twenty-two (22) page Order affirming the suspension. The NHLPA subsequently appealed the Commissioner's decision to the NDA, pursuant to Article 18.13 of the CBA. The NDA issued the arbitration award at issue in this litigation – decreasing Mr. Wideman's suspension from twenty (20) to ten (10) games.

The NDA's award should be vacated because he exceeded the authority accorded to him under the CBA, which provides that the NDA's review of a decision imposing supplementary discipline is limited to determining whether the Commissioner's decision is supported by "substantial evidence." Although the NDA paid lip service to this standard, his opinion made no effort to discern whether there was "substantial evidence." Instead, the NDA conducted a *de*

novo review of the evidence and made his own factual findings. The NDA overturned the Commissioner's Order not because it was not supported by "substantial evidence," but rather because he reached a different conclusion concerning Mr. Wideman's intent. In so doing, the NDA exceeded his contractual authority.

II. STATEMENT OF FACTS

A. Supplementary Discipline Under The Collective Bargaining Agreement

The parties' CBA sets forth terms and conditions of employment for players employed by NHL member clubs. The CBA incorporates by reference the League's Playing Rules. *Art. 30.2* (Baumgarten Decl. Ex. 1). Article 18 of the CBA governs supplementary discipline for on-ice conduct, defined as "Player conduct either on the ice or in the Player or penalty bench areas vis-à-vis other participants in the game (i.e., other Players, coaches, or on-ice officials) in violation of the League Playing Rules." *Art. 18.1* (Baumgarten Decl. Ex. 1). Article 18.2 specifies that the following factors will be taken into account by the League in deciding whether and to what extent to impose supplementary discipline:

(a) The type of conduct involved: conduct in violation of League Playing Rules, and whether the conduct is intentional or reckless, and involves the use of excessive and unnecessary force. Players are responsible for the consequences of their actions.

(b) Injury to the opposing Player(s) involved in the incident.

(c) The status of the offender and, specifically, whether the Player has a history of being subject to Supplementary Discipline for On-Ice Conduct. Players who repeatedly violate League Playing Rules will be more severely punished for each new violation.

(d) The situation of the game in which the incident occurred, for example: late in the game, lopsided score, prior events in the game.

(e) Such other factors as may be appropriate in the circumstances.

Id. at *Art. 18.2* (emphasis in original).

Article 18 also sets forth the procedures for the conduct of hearings where a preliminary review by the League results in the consideration of potential supplementary discipline. Those procedures include, *inter alia*, an in-person hearing where the preliminary review indicates that a suspension of six or more games may be appropriate.

The NHLPA, on a player's behalf, may appeal any decision by the League imposing supplementary discipline to the Commissioner, who "will determine whether the decision was supported by clear and convincing evidence." *Art. 18.12* (Baumgarten Decl. Ex. 1).

In the event of a suspension of six or more games, Article 18.13 of the CBA allows an appeal of the Commissioner's decision to a Neutral Discipline Arbitrator. The CBA outlines the NDA's limited authority to review the Commissioner's decision. Article 18.13(c) of the CBA provides:

> The NDA shall hold an in-person hearing and shall determine whether the final decision of the League regarding whether the Player's conduct violated the League Playing Rules and whether the length of the suspension imposed were supported by *substantial evidence*.

(Baumgarten Decl. Ex. 1) (emphasis added).

As with an appeal to the Commissioner, the NDA may also consider any evidence relating to the incident, even if such evidence was not previously available. *Id.*

B. The Wideman Incident

The underlying facts giving rise to the suspension were captured in video footage of the Calgary-Nashville game, which was introduced as evidence in the hearing conducted by the Commissioner and in the hearing conducted by the NDA. (Baumgarten Decl. Ex. 2). After making a pass from his defensive corner of the ice, Mr. Wideman was checked into the boards. As play continued, Mr. Wideman skated almost half the length of the ice parallel to the boards

towards Calgary's bench. Before Mr. Wideman reached the blue line, he raised his stick high in the air with one hand and tapped it on the ice to call for a substitution.[1] As Mr. Wideman neared the bench, he approached linesman Don Henderson, as the linesman was skating slowly backwards. The two collided and the blow knocked Mr. Henderson face first onto the ice.[2] Mr. Wideman then skated around Mr. Henderson's prone body and proceeded to the Calgary bench.

C. The Initial Disciplinary Decision

On January 28, 2016, Mr. Wideman was suspended indefinitely pending an in-person hearing before Colin Campbell, NHL Senior Executive Vice President of Hockey Operations. On February 2, 2016, Mr. Campbell conducted the supplementary discipline hearing (as provided for in Article 18.9 of the CBA) in Toronto. (*See* Baumgarten Decl. Ex. 1). On February 3, 2016, the League announced that Mr. Wideman was suspended for twenty (20) games. (Baumgarten Decl. Ex. 2).

In accordance with its customary practice, the League's press release announcing the suspension was accompanied by an explanatory video posted on the NHL website, NHL.com. (Baumgarten Decl. Ex. 2). The video explained (and showed) that Mr. Wideman had skated half the length of the ice towards the Calgary bench in order to make a line change after being checked into the boards. As he approached Mr. Henderson (who was skating backwards), Mr. Wideman raised his stick and delivered a forceful cross-check to Mr. Henderson's upper back, causing him to fall forward onto the ice. The video explanation cited League Playing Rule 40, which sets forth three categories of offenses under the heading "Physical Abuse of Officials."

[1] This is a universally recognized method of calling for a substitution in the hockey world and was recognized as such by one of Mr. Wideman's teammates, who immediately left the bench to replace him. *See* NDA Award at 6-7 (Baumgarten Decl. Ex. 6).

[2] Mr. Henderson was subsequently diagnosed with a concussion and other injuries. Mr. Henderson's injuries have prevented him from returning to work as an NHL linesman. *See* NDA Hearing Tr. at 508-09 (Baumgarten Decl. Ex. 7).

(*See* Baumgarten Decl. Ex. 2). The most serious offense – denominated a "Category I" offense under Rule 40.2 – provides:

> Any player who deliberately strikes an official and causes injury or who deliberately applies physical force in any manner against an official with intent to injure, or who in any manner attempts to injure an official shall be automatically suspended for not less than twenty (20) games.

(Baumgarten Decl. Ex. 3).

The video noted that Mr. Wideman was later diagnosed as having suffered a concussion when checked into the boards but that this did not excuse his subsequent actions given the nature and severity of his conduct. (Baumgarten Decl. Ex. 2).

D. The NHLPA's Appeal To The Commissioner

Pursuant to Article 18.12, the NHLPA filed an appeal from the twenty (20) game suspension. (Baumgarten Decl. Ex. 1). Commissioner Bettman held an in-person hearing on February 10, 2016 at the League offices in New York City. Bettman Order at 2 (Baumgarten Decl. Ex. 4). The Commissioner heard testimony from Mr. Wideman, two expert witnesses called by the NHLPA, and from Mr. Henderson. The evidence at the hearing included, among other things, the video explanation referred to above and video footage presented by the NHLPA of three other allegedly comparable collisions that did not result in discipline. *Id.* at 7.

The CBA requires the Commissioner to determine whether the initial Supplementary Discipline decision was "supported by clear and convincing evidence." *Art. 18.12* (Baumgarten Decl. Ex. 1). The CBA also authorizes the Commissioner to "consider any evidence relating to the incident even if such evidence was not available at the time of the initial Supplementary Discipline for On-Ice Conduct decision." *Id.*

In an order dated February 17, 2016, Commissioner Bettman affirmed the twenty (20) game suspension, finding that it was supported by clear and convincing evidence. Bettman Order at 1 (Baumgarten Decl. Ex. 4). The Commissioner's detailed twenty-two (22) page opinion included the following findings:

1. The on-ice officials had not observed the incident and, as a result, no game misconduct penalty was called. Therefore, Mr. Wideman was not subject to an automatic suspension under Rule 40.[3] Nonetheless, the Commissioner noted that Article 18.2(e) allows the League to consider "[s]uch other factors as may be appropriate in the circumstances" when contemplating supplementary discipline. The Commissioner found Playing Rule 40 to be a "useful (albeit non-binding) framework (together with the applicable Article 18.2 factors quoted above) for determining discipline." *Id.* at 4-5.

2. Based on his review of the video evidence, the Commissioner found that Mr. Wideman's conduct "fits easily within the framework of Category I offenses." In particular, the Commissioner found that Mr. Wideman struck Mr. Henderson "with the shaft of his stick" and "caused him injury." Thus, the Commissioner found that Mr. Wideman's conduct had satisfied both of the first two prongs of Rule 40.2. Moreover, "[s]eparate and apart from Rule 40.2, it is also conduct that involved the use of excessive and unnecessary force within the meaning of Article 18.2(a) of the CBA." *Id.* at 6-7.

[3] By its terms, Playing Rule 40 provides that physical abuse of an official is punishable by a game misconduct penalty and an automatic suspension depending on the severity of the infraction. The rule provides for three categories of offenses, the most severe of which ("Category I") requires a minimum twenty (20) game suspension. When a game misconduct penalty is called, "the Referees shall, in consultation with the Linesmen, decide the category of the offense." That determination is then reviewable by the Commissioner at the request of either the player or the officials. R. 40.5 (Baumgarten Decl. Ex. 3). In this case, however, no game misconduct penalty had been called because the officials did not see the collision. Bettman Order at 4 (Baumgarten Decl. Ex. 4); *see also* NDA Award at 13 (Baumgarten Decl. Ex. 6). The matter instead came before the Commissioner pursuant to the supplementary discipline provisions of Article 18 and Playing Rule 28, which also vests the Commissioner with authority to assess discipline "whether or not such offense has been penalized by the Referee." Bettman Order at 3-5 (Baumgarten Decl. Ex. 4).

3. The Commissioner rejected the NHLPA's comparison of the Wideman-Henderson collision to three other collisions between players and officials that had not resulted in the imposition of supplementary discipline. He observed that each of those other incidents had occurred in the midst of play and in full view of the on-ice officials, who had not called penalties. By contrast, the Wideman-Henderson collision:

> . . . did not involve anything that remotely resembled a "hockey play." Mr. Wideman skated nearly half the length of the ice, away from the play. While approaching the official from behind, Mr. Wideman lifted his stick off the ice while still several feet away, clenched it in both hands and struck the official – extending his arms forcefully – when they met. When asked why he had lifted the stick with both hands before even reaching the linesman, Mr. Wideman could offer no explanation.

Id. at 7 (citing Bettman Hearing Tr. at 77).

4. The Commissioner rejected the NHLPA's contention that Mr. Wideman's conduct should be excused on the basis of diminished capacity resulting from a concussion that he had suffered when checked into the boards prior to the collision with Mr. Henderson. His opinion reviewed in detail the facts and opinions contained in the reports prepared by the two expert witnesses proffered by the NHLPA (Dr. Paul Comper and Dr. Jeffrey Kutcher) and the witnesses' testimony at the hearing. The Commissioner noted a variety of flaws in the expert witnesses' methodology for rendering their respective opinions based on Mr. Wideman's mental state at the time of the incident. Moreover, the Commissioner found contradictions between the conclusions stated by each expert in his report and the testimony offered by each expert during the hearing. In certain respects, the experts also contradicted each other or Mr. Wideman himself. In other respects, the expert witnesses' testimony offered was clearly inconsistent with the video footage of the incident. Thus, the Commissioner found that "the expert testimony presented on behalf of the Player was speculative, at times contradictory, lacked support and was

wholly insufficient to rebut the clear and convincing evidence provided by the video footage of the incident." *Id.* at 8-21 (noting that video footage showed, *e.g.,* that Mr. Wideman did not "swerve out of the way" or "merely bump into [Henderson];" that Wideman "raised his stick and cross-checked [Henderson] in the upper back;" that Wideman "was aware enough to tap his stick on the ice to signal a line change;" and that Wideman "hit the official with full force and then continued to the Calgary bench").

5. The Commissioner also declined to credit Mr. Wideman's testimony that he tried to avoid Mr. Henderson after seeing him only at the last minute. In particular, the Commissioner noted that Mr. Wideman "did not swerve out of the way" or "merely bump into the linesman," but rather "raised his stick and cross-checked him in the upper back." Moreover, Commissioner Bettman found that Mr. Wideman was aware enough of what was occurring, prior to his collision with Mr. Henderson, to tap his stick on the ice to signal a line change and skate, with purpose and without wobbling, directly towards the Calgary bench. Commissioner Bettman further found that Mr. Wideman was so stable on his feet that "he hit the official with full force and then continued to the Calgary bench. Even if one were to assume some level of distress on Mr. Wideman's part as a result of a concussion or other injury caused by the Salomaki check, there was no sign he was disoriented in any material way…." *Id.* at 21.

In sum, the Commissioner concluded that the twenty (20) game suspension was supported by clear and convincing evidence. *Id.* at 22.

E. The NHLPA's Appeal To The Neutral Discipline Arbitrator

The NHLPA appealed Commissioner Bettman's Order to the Neutral Discipline Arbitrator pursuant to Article 18.13 of the CBA – the first time an appeal was taken under this

provision, which was a new provision added to the 2012-2022 CBA. (Baumgarten Decl. Ex. 1); *see also* NDA Award at 3 n. 4 (Baumgarten Decl. Ex. 6).

The NDA conducted a hearing on February 25 and 26, 2016 and post-hearing briefs were filed by the parties on March 4, 2016. *Id.* at 3. The NDA heard testimony from witnesses presented by both sides and considered other evidence including, but not limited to, video footage of the collision itself.

On March 10, 2016, the NDA issued the arbitration award at issue in this case – a reduction in Mr. Wideman's suspension to ten (10) games. *Id.* at 17. Although the NDA accurately articulated the standard of review – whether the Commissioner's decision to affirm the twenty (20) game suspension of Mr. Wideman was supported by "substantial evidence" (*Id.* at 6) – that is not, in fact, the standard he applied in making his determination. As discussed *infra*, he instead reviewed the entire body of evidence *de novo* and concluded: (i) that he disagreed with the Commissioner's determination that Mr. Wideman's conduct amounted to a Category I offense and (ii) that the conduct merited only a ten (10) game suspension.

III. ARGUMENT

A. The NHLPA's Motion To Dismiss Should Be Denied

The NHLPA contends that the NHL should have commenced this action via the filing of a "motion" under the Federal Arbitration Act ("FAA"), rather than by filing a complaint. NHLPA Motion to Dismiss ("MTD"), Doc. No. 14. That argument is without merit. Because this action arises under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, it was properly commenced by the filing of a complaint.

The Second Circuit has long held that actions to confirm or vacate arbitration awards issued under collective bargaining agreements are governed by Section 301 and not by the FAA (though a court may look to the FAA for guidance as to the substantive standards to be applied).

The Second Circuit recently reaffirmed this point in a decision that the NHLPA itself relies upon in its moving papers, *National Football League Management Council v. National Football League Players Association*, 820 F.3d 527 (2d Cir. 2016) (*"Brady"*). That case was commenced in this Court by the filing of a complaint by the NFL Management Council under Section 301 seeking confirmation of the arbitration award at issue. Complaint, *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, *15*-CV-5916 (RMB) (S.D.N.Y. July 28, 2015), Doc. No. 4. The Second Circuit observed that "[t]he FAA does not apply to arbitrations, like this one, conducted pursuant to the LMRA," though "'the federal courts have often looked to the [FAA] for guidance in labor arbitration cases.'" *Id*. at 545 n.13 (citing *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987)); *see also Coca-Cola Bottling Co. of N.Y. v. Soft Drink & Brewery Workers Union, Local 812, Int'l Bhd. of Teamsters*, 242 F.3d 52, 53 (2d Cir. 2001) ("in cases brought under Section 301 . . . the FAA does not apply"); *1199 SEIU United Healthcare Workers E. v. Lily Pond Nursing Home,* No. 07 Civ. 0408, (JCF), 2008 WL 4443945, at *3 (S.D.N.Y. Sept. 29, 2008) ("the literal terms of the FAA are inapplicable to actions brought under the LMRA to enforce labor arbitration awards"); *Orange & Rockland Utils., Inc. v. Local 503, IBEW*, No. 05 Civ. 6320 (WCC), 2006 WL 1073049, at *2 (S.D.N.Y. Apr. 21, 2006) ("the Second Circuit has expressly eliminated the applicability of the FAA in LMRA § 301 cases") (citing *Coca-Cola Bottling Co. of N.Y.*, 242 F.3d at 54)[4].[5]

[4] The court, in *Orange and Rockland Utilities, Inc.,* also noted that failure to bring a vacatur action, even in a case governed by the FAA, is not fatal. 2006 WL 1073049, at *3 (citing *O.R. Sec., Inc. v. Prof'l Planning Assocs., Inc.*, 857 F.2d 742, 746 (11th Cir. 1988); *see also U.S. Ship Mgmt., Inc. v. Maersk Line, Ltd.*, 188 F. Supp. 2d 358, 363 (S.D.N.Y.), *aff'd*, 51 F. App'x 66 (2d Cir. 2002); *Finkelstein v. UBS Glob. Asset Mgmt. (US) Inc.*, No. 11 CV 0356 (GBD), 2011 WL 3586437, at *4 (S.D.N.Y. Aug. 9, 2011); *Trs. for Mason Tenders Dist. Council Welfare Fund v. Nacirema Envtl. Servs. Co.*, No. 13 Civ. 3574 (SAS), 2015 WL 1026695, at *1 n.1 (S.D.N.Y Mar. 9, 2015) (explaining that although under the FAA "filing of a petition—as opposed to a complaint—is the generally accepted means to obtain confirmation of an arbitration award, [the Court] will treat the complaint as a petition because the notice requirements were met and petitioners requested appropriate relief for a petition"). The court further noted that the defendant's motion challenging the sufficiency of the pleading and seeking confirmation of the award at

The NHLPA's motion to dismiss represents an attempt to perpetuate what has been referred to as "the unfortunate tendency of courts in this Circuit to conflate review of awards under the FAA and under § 301." *Local 1, United Ass'n of Journeymen v. Bass Plumbing & Heating Corp.*, No. 13-CV-3837 (NGG)(VVP), 2015 WL 1402884, at *5 (E.D.N.Y. Mar. 25, 2015) (citing *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 221-22 (2d Cir. 2002) (internal quotation marks omitted). The two key cases relied upon by the NHLPA – *Kruse v. Sands Bros. & Co.*, 226 F. Supp. 2d 484 (S.D.N.Y. 2002), and *O.R. Sec., Inc. v. Prof'l Planning Assocs., Inc.*, 857 F.2d 742 (11th Cir. 1988) – both involved cases arising out of commercial arbitration awards. Thus, both cases were governed by the FAA and not by Section 301.

In sum, the NHL's complaint under the LMRA is proper and timely.

B. The Arbitration Award Must Be Vacated Because The Neutral Discipline Arbitrator Exceeded His Collectively Bargained Authority

Predictably, the NHLPA relies on cases that stand for the general proposition that courts owe substantial deference to labor arbitration awards and that a court must confirm such an award so long as it "draws its essence from the collective bargaining agreement," even if the Court would have decided the matter differently. *See, e.g.,* NHLPA MTD at 16, Doc. No. 14. That proposition is not in dispute. What makes this case different from the routine case involving arbitration, however, is that the award here was not issued by an arbitrator who was accorded plenary authority by the CBA to decide disputes arising thereunder. The parties knew full well how to grant such authority because they did exactly that in Article 17 of the CBA,

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issue had "place[d] this action in a proper procedural posture" – ripe for such summary proceedings. *Orange & Rockland Utils., Inc.*, 2006 WL 1073049, at *3. The same is true here.

[5] The NHLPA itself has previously challenged an arbitration award by filing a complaint invoking Section 301, as opposed to a motion under the FAA. *See* Report and Recommendation, *Nat'l Hockey League Players' Ass'n. v. Bettman*, No. 93 Civ. 5769 (KMW), 1994 U.S. Dist. LEXIS 21715 (S.D.N.Y. Nov. 9, 1994) (Doc. No. 1), *accepted & adopted*, 1994 U.S. Dist. LEXIS 21714 (S.D.N.Y. Dec. 7, 1994). The court there also recognized that the FAA does not govern a challenge to an arbitration award under Section 301. *Id.* at *35-36.

which provides generally for an Impartial Arbitrator to hear and decide "any dispute involving the interpretation or application of, or compliance with, any provision of this Agreement, including any SPC." *See Art. 17.1* and *Art. 17.5* (Baumgarten Decl. Ex. 1).

That, however, is precisely not what the parties agreed to in Article 18 with respect to the scope of authority granted to the NDA in a review of a Commissioner's determination concerning supplementary discipline. Rather, Article 18.13, which is new to the current CBA, carves out a narrow role and scope of authority for the NDA, whose authority is not to decide questions of fact, but rather to review the Commissioner's decision to determine whether it is supported by "substantial evidence." (Baumgarten Decl. Ex. 1). If there is "substantial evidence" to support the Commissioner's determination, then the NDA's obligation is to affirm the Commissioner's decision. *Id.* The language of Article 18.13 is clear and unmistakable in that regard:

> The NDA shall hold an in-person hearing and shall determine whether the final decision of the League regarding whether the Player's conduct violated the League Playing Rules and whether the length of the suspension imposed were *supported by substantial evidence*. . . . The NDA shall have full remedial authority in respect of the matter should he/she determine that the Commissioner's decision *was not supported by substantial evidence*.

Id. (emphasis added).

This Court has the authority to determine whether the NDA exceeded his authority by arrogating to himself the responsibility for making factual determinations rather than reviewing the record to determine whether the Commissioner's findings were supported by substantial evidence. "An arbitrator's power is both derived from, and limited by, the collective-bargaining agreement." *Leed Architectural Prods., Inc. v. United Steelworkers of Am., Local 6674*, 916 F.2d 63, 66 (2d Cir. 1990). Therefore, an "arbitrator's authority to settle disputes under a

collective bargaining agreement is contractual in nature and is limited to the powers that the agreement confers." *Id.* at 65. While circumstances warranting relief may be rare, it is clear that neither this, nor any other, court is required by law or policy to defer to an arbitration award in which the arbitrator's own words "manifest an infidelity" to his obligations under the CBA. *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (explaining that in such a case "courts have no choice but to refuse enforcement of the award"). Moreover, the NHLPA cannot "shield an 'outlandish disposition of a grievance' from judicial review" simply because the NDA made some of the "right noises—noises of contract interpretation." *Leed Architectural Prods., Inc.*, 916 F.2d at 65 (internal quotation and citation omitted).

Here, the Court essentially sits in an analogous role to that of an appellate court reviewing a lower court's decision to vacate a federal agency action because the agency made factual findings that are "unsupported by substantial evidence" within the meaning of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(E). Courts have uniformly recognized that the "substantial evidence" standard requires substantial deference. The Supreme Court has defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" and "enough [evidence] to justify, if the trial were to a jury, a refusal to direct a verdict." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1996) (emphasis added) (citations omitted). The Court continued, "[t]his is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a] finding from being supported by substantial evidence." *Id*. *See also Omnipoint Commc'ns, Inc. v. City of White Plains*, 430 F.3d 529, 533 (2d Cir. 2005) (noting that the "substantial evidence" standard is satisfied if there is "less than a preponderance, but more than a scintilla of evidence") (citing *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490,

494 (2d Cir. 1999)*; Mazariegos v. Office of U.S. Attorney Gen.*, 241 F.3d 1320, 1324 (11th Cir. 2001) (stating that the petitioner insisting that there is substantial evidence for contrary findings "confuses the issue" since the correct "inquiry is whether there is substantial evidence for the findings made . . . not whether there is substantial evidence for some other finding that could have been, but was not, made").

The deferential "substantial evidence" standard applies to all factual findings including credibility determinations. *Stone & Webster Constr., Inc. v. U.S. Dep't of Labor*, 684 F.3d 1127, 1133 (11th Cir. 2012) (explaining that "substantial evidence exists even when two inconsistent conclusions can be drawn from the same evidence" and that "[t]he substantial evidence standard limits the reviewing court from deciding the facts anew, making credibility determinations, or re-weighing the evidence") (internal citations and quotation marks omitted); *see also N.C. Dep't of Health & Human Servs. v. Maxwell*, 576 S.E.2d 688, 691 (N.C. Ct. App. 2003) (leaving undisturbed all credibility determinations on review for "substantial evidence," noting that "[c]redibility determinations and the probative value of particular testimony are for the administrative body to determine, [as] it may accept or reject in whole or part the testimony of any witness").

Here, the NDA correctly articulated the issue to be decided as "[whether] the Commissioner's decision to affirm the 20-game suspension was supported by substantial evidence, as provided in Article 18.13[(c)] of the CBA." NDA Award at 6 (Baumgarten Decl. Ex. 6). Remarkably, though perhaps unsurprisingly given the NDA's admitted disregard for this circuit's definition of "substantial evidence," his opinion proceeded immediately to ignore that collectively bargained mandate, beginning with his summary description of the incident as follows:

> All participants in this case have viewed the video coverage of the collision between Wideman and Henderson multiple times. As has been evident throughout this proceeding, *interpretations of exactly what happened can and do differ. I state my own version in detail below, but a capsule summary should be given at the outset.*

Id. (emphasis added).[6]

The collectively bargained and defined role of the NDA, however, was not to offer his "own version" of what happened but only to determine whether the Commissioner's "version" was supported by substantial evidence. *Art. 18.13* (Baumgarten Decl. Ex. 1). Stated another way, once he found that "interpretations of exactly what happened can and do differ," the "substantial evidence" standard of review had been satisfied and the NDA had no authority to substitute his interpretation for that of the Commissioner.

Lest there be any doubt as to the fact that the NDA substituted his interpretation of the facts for that of the Commissioner, he went on to set forth what he called "[m]y frame-by-frame review of the video," referring to the footage that was reviewed by both Mr. Campbell and Commissioner Bettman, which produced the NDA's own narrative – a narrative marked by his own hypotheses and suppositions, *e.g.,* that it was "possible, given the speed of events and Wideman's condition, that Henderson may have been but a blurred distraction;" that "Henderson's weight was on his left skate, which may have made him more vulnerable to an unexpected push against his back than he might otherwise have been;" that although Mr. Henderson testified at the hearing before the NDA that he had been hit "up in the shoulders"[7]

[6] The NDA's observation that interpretations "can and do differ" echoed the observation of the NHLPA's counsel, who commented in his opening statement that "reasonable people can clearly have different interpretations" of the video evidence. NDA Hearing Tr. at 119 (Baumgarten Decl. Ex. 7).

[7] The NDA wrote that "[s]ome observers of the video have characterized the contact between Wideman and Henderson as a cross-check, but this is inaccurate." NDA Award at 10 (Baumgarten Decl. Ex. 6). The NDA then explained that "[a] true cross-check would occur with the stick approximately horizontal and with both hands somewhat widely separated with palms facing downward towards the ice, thus allowing full pushing strength from

and that it felt as though he had been "hit by a bus" it "seems much more likely that the hit that he felt . . . was when his head hit the boards on the way down;" and that Mr. Wideman "cannot have seen Henderson fall." NDA Award at 10-11 (Baumgarten Decl. Ex. 6).

Later, in his discussion of Commissioner Bettman's decision, the NDA commented that he "[did] not agree with the Commissioner's conclusion that Wideman's behavior fits easily within the wording of Rule 40.2, justifying automatically a minimum suspension of twenty games." *Id.* at 13. Rather, the NDA opined that "Wideman did not, *in my opinion*, 'deliberately strike' Henderson within the meaning of that phrase in Rule 40.2." *Id.* at 14 (emphasis added). According to the NDA:

> My fundamental disagreement with Commissioner Bettman's decision, is that, based on the totality of the evidence presented to me, I do not think that Wideman's behavior was animated by an intent to injure Henderson, even taking into account the parenthetical definition of 'intent to injure' in Rule 40.2. . . ."[8]

Id. Again, the quoted language reflects a fundamental (and fatal) misconception by the NDA concerning the scope of his authority. His role was not to decide facts or to overrule Commissioner Bettman where his interpretation of the evidence led him to a different conclusion. *See Art. 18.13(c)* (Baumgarten Decl. Ex. 1). Rather, his role was to decide only whether the Commissioner's decision was supported by substantial evidence based on the record – even if the NDA himself would have reached a different conclusion. *Id.*

Nowhere in the opinion, however, did the NDA even purport to parse the record to determine whether the evidence was sufficiently "substantial" to support the Commissioner's

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arms and shoulders." *Id.* However, a "cross-check" is defined by Playing Rule 59 as "[t]he action of using the shaft of the stick between the two hands to forcefully check an opponent." R. 59.1 (Baumgarten Decl. Ex. 3). Although this error in and of itself is immaterial to whether the NDA's award should be vacated, it serves as further evidence of the NDA's penchant for replacing contractually mandated terms with his own interpretation of events.

[8] League Playing Rule 40.2 defines "intent to injure" for the purpose of the rule as "any physical force which a player knew or should have known could reasonably be expected to cause injury." (Baumgarten Decl. Ex. 3).

determination. *See generally* NDA Award (Baumgarten Decl. Ex. 6). Rather, as discussed above, the NDA acted as though he had authority to determine those facts himself *de novo*, freely substituting his interpretation of the video evidence for that of the Commissioner. Thus, while Commissioner Bettman found that "Mr. Wideman struck Mr. Henderson with the shaft of his stick and caused him injury" and in so doing "deliberately applied physical force in a way that a player would know (or should know) could reasonably be expected to cause injury," the NDA simply disagreed. NDA Award at 14 (Baumgarten Decl. Ex. 6); *see also* Bettman Order at 7 (Baumgarten Decl. Ex. 4). Relying instead on his own "analysis of the video," the NDA concluded that Mr. Wideman applied physical force without intent to injure, a Category II violation under Playing Rule 40.3. NDA Award at 14-15 (Baumgarten Decl. Ex. 6). According to the NDA, "[t]his is the description into which, *in my opinion*, Wideman's actions fit easily." *Id.* at 15 (emphasis added).

Likewise, the NDA substituted his judgment for that of the Commissioner in determining whether Wideman "knew or should have known" that his "push" could reasonably be expected to cause injury. As noted above, Commissioner Bettman found (based on the video footage and the testimony of Wideman himself) that Wideman knew or should have known that his contact with Henderson would be likely to cause injury. Bettman Order at 7 (Baumgarten Decl. Ex. 4). The NDA noted that "[w]hat, exactly, Wideman should have known . . . is not an easy question to answer." NDA Award at 16 (Baumgarten Decl. Ex. 6). Yet, the NDA proceeded to answer it differently than the Commissioner, not because he concluded that the Commissioner's finding lacked substantial evidence (consisting of the video itself), but simply because he "[did] not believe that in his concussed state, Wideman could or should have anticipated that his push

would cause Henderson to fall and bang his head against the boards sufficiently hard to put Henderson also in a concussed state." *Id.*

The NHLPA concedes, as it must, that the NDA's opinion is marked by his "tendency to frame his conclusions as his 'version' or his 'analysis' or his 'interpretation' of the facts or the CBA." NHLPA MTD at 22-23, Doc. No. 14. The Union argues, without an iota of support, that these admissions of non-adherence to the collectively bargained standard of review by the NDA should be disregarded because "[a]n arbitration award is not a statute to be parsed in that way." *Id*. at 23. However, it is only by examining the award itself that the Court can discern whether or not the NDA acted within his contractual authority. This is necessarily so because when "the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *United Steelworkers of Am.*, 363 U.S. at 597.

Moreover, the Union's suggestion that the NDA's statements were "simply the building blocks of his conclusion that the record as a whole did not provide substantial evidence supporting Mr. Bettman's order," (NHLPA MTD at 23, Doc. No. 14) disregards the plain language of the award itself. Nowhere in the award did the NDA even undertake an analysis of whether there was "substantial evidence" supporting the Commissioner's decision. From beginning to end, the award is an exercise in *de novo* fact-finding.

The NHLPA's motion to confirm also suggests that the NDA was authorized to engage in *de novo* fact-finding because the CBA authorized him to hear new evidence that had not been submitted to the Commissioner. *See id.* at 18-20. The cases cited by the NHLPA, however, are inapposite for the critical reason that none of them involved a "substantial evidence" standard of review. In *Kappos v. Hyatt*, 132 S. Ct. 1690, 1695 (2012), the U.S. Supreme Court held that a district court faced with a suit under 35 U.S.C. § 145, a civil action by a dissatisfied patent

applicant against the Director of the Patent and Trademark Office, is empowered to hear new evidence and decide factual questions *de novo*. Unlike the present case, where there is a collectively bargained standard of review, 35 U.S.C. § 145 does not contain a mandated standard of review. Thus, in *Kappos*, the Supreme Court rejected the contention that "background principles of administrative law . . . require a deferential standard of review" in cases brought pursuant to § 145. *Id.* at 1696. Likewise, in *Garcia v. Bd. of Educ.*, 520 F.3d 1116 (10th Cir. 2008), the court considered a challenge to an administrative law judge's decision under the Individuals with Disabilities Education Act ("IDEA"). There, again, the applicable statute did not incorporate the "substantial evidence" standard of review. In fact, the IDEA expressly stated not only that the district court had the authority to hear additional evidence, but also that the court should decide cases based on a preponderance of the evidence. 20 U.S.C. § 1415(i)(2)(i-iii).

By contrast, the parties here bargained both for a "substantial evidence" standard of review and for the right to present new evidence for the first time to the NDA. *Art. 18.13(c)* (Baumgarten Decl. Ex. 1). The NDA did not (nor could he) interpret these provisions to vest him with the authority to decide factual questions *de novo*. Rather, the NDA interpreted these provisions to mean that the NDA is authorized "to decide whether the totality of the evidence presented at the NDA hearing comprises substantial support for the Commissioner's decision." NDA Award at 12 (Baumgarten Decl. Ex. 6). Whatever the phrase "substantial support" may have been intended to mean, the NDA himself articulated the scope of his authority as limited to a review under the "substantial evidence" standard. *Id.* at 6. The problem is that he then utterly failed to conform his decision-making to that standard and, in so doing, dramatically exceeded his authority.

Had the NDA acted within his contractual authority, he would have found substantial evidence to support the Commissioner's determination.

First, substantial evidence of what happened was the video footage of the collision itself. (Baumgarten Decl. Ex. 2). Indeed, the NDA himself acknowledged that "[t]he parties agree that the video of the collision is the *best evidence* we have of exactly what happened." NDA Award at 9 (Baumgarten Decl. Ex. 6) (emphasis added). As detailed in Commissioner Bettman's opinion, the video shows Mr. Wideman skating towards the Calgary bench after being checked in his own end. While still several feet away from Mr. Henderson, who was skating backwards in his direction, Mr. Wideman lifted his stick from the ice, grasped it with both hands, raised it high enough to apply it to the shoulder area of the taller Mr. Henderson, extended his arms and struck Mr. Henderson. Bettman Order at 7 (Baumgarten Decl. Ex. 4). While the NDA might have disagreed with aspects of the Commissioner's description of what happened, he could not – and did not – suggest, much less find, that the video itself was not substantial evidence or that it was not susceptible to the findings made by the Commissioner. Indeed, as noted above, the NDA conceded that interpretations of what happened "can . . . differ" – and the Union itself conceded that "reasonable people" could view the video evidence differently. Nevertheless, the NDA conducted his own "frame-by-frame" *de novo* review, as evidenced by the arbitration award itself. This resulted in his substituting his own factual findings for those of the Commissioner concerning Mr. Wideman's conduct.

Second, Commissioner Bettman considered, and rejected, the NHLPA's expert testimony concerning Mr. Wideman's diminished capacity defense. *Id.* at 8-21. Although the Union presented the same experts to testify again before the NDA, their testimony was again disregarded because the NDA concluded that their medical opinions were "necessarily

inconclusive." NDA Award at 9 n.9 (Baumgarten Decl. Ex. 6). It is presumably for this reason that the NHLPA's motion to confirm ignores the evidence from the experts despite the fact that so much of both hearings were devoted to their testimony.

Third, the Commissioner took into account the testimony of Mr. Wideman himself, who testified both before Commissioner Bettman and again before the NDA. As Commissioner Bettman found, Mr. Wideman's testimony did not support the contention that he was confused or materially incapacitated by virtue of a concussion suffered when he was checked. To the contrary, Commissioner Bettman carefully examined Mr. Wideman's testimony and found it inconsistent with the diminished capacity defense:

> Although Mr. Wideman did tell Dr. Comper that he was "not registering," he also said that he knew he had to get to the bench and that he was "focused" on getting there. Mr. Wideman testified at the hearing that "I knew I wasn't right. I knew I was injured, and I knew I had to get off the ice. He knew all of that "within an instant" of the Salomaki hit. I do not accept the proposition that Mr. Wideman "knew" all of that without also knowing that he could not cross-check the linesman, particularly in light of the fact that Mr. Wideman skated directly to the bench with his head up and gave no indication that he was confused (e.g., he did not hesitate, he did not skate in the wrong direction, or to the wrong bench or to the penalty box). Along the way, he lifted his stick and tapped it on the ice to signal a line change to his bench. (Mr. Wideman acknowledged that video of the incident shows Calgary defenseman T.J. Brodie climbing over the boards in response.) Mr. Wideman recognized Mr. Henderson as an on-ice official. He also told Dr. Comper (and testified at the hearing) that he realized that he was going to hit Mr. Henderson just before he did so and that he attempted to get out of the way, thus undermining Dr. Kutcher's suggestion that he experienced "situational unawareness." Moreover, after striking Mr. Henderson, Mr. Wideman continued past the end of the Nashville bench and stepped directly onto Calgary's bench, making clear (again) that he knew exactly where he was. In these circumstances, the hypothesis that Mr. Wideman lacked "situational awareness" strains common sense beyond the point of credibility.

Bettman Order at 16-18 (Baumgarten Decl. Ex. 4) (internal citations omitted). At the hearing before the NDA, Mr. Wideman again acknowledged that he knew exactly where he was at the critical moment:

> Q. You knew exactly where the bench was; isn't that right?
>
> A. Yeah.
>
> Q. And you skated right around that prone body onto the bench, correct?
>
> A. Yeah.

NDA Hearing Tr. at 186 (Baumgarten Decl. Ex. 7).

Fourth, Commissioner Bettman's determination was supported by the testimony of Linesman Henderson, who testified both before the Commissioner and before the NDA. Mr. Henderson, who stands 6' 2" and weighs in excess of 225 pounds, testified that Mr. Wideman struck him high in the back and that it "felt like I got hit by a bus." *Id.* at 502. Mr. Henderson also offered testimony to rebut the NHLPA's contention that the collision was accidental and unavoidable. Both he and Stephen Walkom (the NHL's Director of Officiating) testified that players routinely "wrap" or "bear-hug" on-ice officials when inadvertent contact is unavoidable. *Id.* at 475-76, 506.

Fifth, Mr. Walkom (who did not testify before the Commissioner) offered additional evidence during the hearing before the NDA to rebut the NHLPA's contention that Mr. Wideman had turned his skates in order to attempt to avoid the linesman. Mr. Walkom (who has officiated in more than one thousand NHL games) testified that Mr. Wideman's turning his skates was consistent "with him trying to minimize flying right over [the] top of [Mr. Henderson] when he hits him with the stick." *Id.* at 490.

Sixth, Calgary team physician, Dr. Ian Auld, testified that he had watched the video footage of the Wideman-Henderson collision between the second and third periods of the Calgary-Nashville game and testified that he did not believe that Mr. Wideman manifested any signs on which the NHLPA relied to support his diminished capacity defense.[9] *Id.* at 529-32.

The point here is not to re-litigate the underlying facts leading to Wideman's suspension or to ask the Court to second-guess factual findings the way the NDA did. Rather, the point is that the NDA vastly exceeded the limited authority accorded to him under the CBA. The discussion above illustrates how the appropriate mode of analysis should have proceeded, in contrast to the NDA's confiscation of the authority to determine facts *de novo* based on his own opinions and interpretations of the evidence.

[9] The NDA disregarded the testimony of Dr. Auld for the same reason that he disregarded the testimony of Drs. Comper and Kutcher, *i.e.*, that "the doctors' medical opinions are necessarily inconclusive." NDA Award at 9 n.9 (Baumgarten Decl. Ex. 6). However, unlike Drs. Comper and Kutcher, Dr. Auld, the team physician, had observed Mr. Wideman play on a regular basis and testified that he was fully familiar with the latter's baseline behavior and demeanor. *See* NDA Hearing Tr. at 531-32 (Baumgarten Decl. Ex. 7).

IV. CONCLUSION

For the reasons set forth above, the NHL's motion for summary judgment vacating the award of the NDA should be granted, and the NHLPA's motion to dismiss or, in the alternative, to confirm, should be denied.

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Respectfully submitted,

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